Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LESLIE G. HARRIS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Missouri

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether the lower courts impermissibly determined that Petitioner's post arrest, post Miranda statement "You've got me, what else can I say" was an incriminating statement and admissible, rather than an invocation of his right to remain silent.

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CITATION TO OPINION AND JUDGMENT BELOW

The opinion of the Missouri Court of Appeals for the Eastern District is reported at 824 S.W.2d 111 (Mo. App. 1992) and is reproduced in the Appendix to this Petition for Writ of Certiorari. The Missouri Supreme Court denied transfer (appendix).

JURISDICTION

Petitioner was convicted of murder in the second degree, assault first degree, and armed criminal action, in the Circuit Court for the City of St. Louis. Petitioner was convicted after a jury trial. Petioners's conviction was afirmed by the Missouri

Court of Appeals, Eastern District on January 14, 1992 (reporduced in Appendix). Petitioner filed an application of transfer to the Missouri Supreme Court (reporduced in Appendix), and the same was denied on March 24, 1992 (reporduced in Appendix).

Jurisdiction of this Honorable Court to review the judgment of the Missouri Supreme Court is invoked by Petitioner under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution, states as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war for public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Harris was charged and convicted of murder in the second degree. The case was heard in the Circuit Court for the City of St. Louis. While in police custody, Petitioner allegedly stated to the police in response to questioning, "You've got me, what can I say?"

At trial, the statement was admitted over Petitioner's objections. The Circuit Attorney for the City of St. Louis made reference to this alleged statement and Petitioner's silence in his closing argument. Petitioner objected and moved for a mistrial on the grounds that such was an impermissible comment on the Petitioners's Constitutionally protected right to remain silent by inferring guilt by silence. The objection and mistrial motion were overruled and there is no attempt at a curative instruction.

REASONS RELIED UPON FOR ALLOWANCE OF THIS WRIT

This Honorable Court should grant this Petition for Writ of Certiorari for the decision affirmed below flatly contradicts this Honorable Court's holding in *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed. 2d 91 1976 and the most recent case dealing with the issue of prosecutorial use of a Defendant's post arrest, post Miranda silence in *Wainwright v. Greenfield*, 106 S.Ct. 634 1986.

ARGUMENT

Petitioner contends that the lower courts committed prejudicial error in allowing the Circuit Attorney for the City of St. Louis to make an impermissible reference to Petitioner's post arrest, post Miranda invocation of his right to remain silent. Such references violated Petitioner's Fifth Amendment Rights to remain silent as well as the fundamental fairness requirement of the Fourteenth Amendment due process clause. This ruling by the lower court, as well as the Supreme Court of Missouri, clearly contradicts the principle and standard espoused by the decision of this Honorable Court in *Doyle v. Ohio*, 426 U.S. 610; 96 S. Ct. 2240 (1976) and *Wainwright v. Greenfield*, 474 U.S. 284; 106 S. Ct. 634 (1986).

This Honorable Court has stated that a prosecuting attorney cannot make comments or references towards a Defendant's right to remain silent. *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240 (1976). In *Doyle*, Defendant was arrested and charged for selling narcotics to an undercover police officer. Upon the reading of his rights per Miranda, the Defendant invoked his right to remain silent. In doing so, Defendant made statements such as "What's this all about?" and "You've got to be crazy," and the like. *Doyle* 426 U.S. 610, 96 S. Ct. 2240, at 2243. Upon cross examination, the prosecutor made numerous reference to the fact that the Defendant did not offer an explanation earlier at the time he was arrested. The District Court allowed this as proper impeachment tactics, and the Defendant was convicted. The U.S. Appellate Court affirmed the conviction and this Honorable Court granted Certiorari.

This Honorable Court reversed and remanded, stating that the use of references to a Defendant's right to remain silent cannot be used for impeachment purposes. Mr. Justice Powell, in delivering the opinion of this Honorable Court, reasoned that to allow such comments would be fundamentally unfair to promise

a Defendant that he has the right to remain silent, and yet to allow the State to use that silence against him. While Mr. Justice Powell commented that silence in general has little probative value due to its latent ambiguity, the primary emphasis of his opinion focused upon need to protect an accused of being misled and deceived by invoking his right to remain silent. *Doyle*, 426 U.S. 616, 618, 1976.

These holdings espoused in *Doyle* by Mr. Justice Powell were not limited to scenarios involving impeachment. This Honorable Court later expanded the rationale in *Doyle* to prohibit the prosecution from commenting on a Defendant's post arrest, post Miranda silence as evidence of sanity. *Wainwright v. Greenfield*, 474 U.S. 284; 106 S. Ct. 634 (1986). In *Wainwright* the prosecutor attempted to use the Defendant's exercise of his right to remain silent as evidence that would contradict the Defendant's claim of *insanity*. This Honorable Court held *Doyle* to be applicable, for the same fears regarding the implicit assurance contained in the Miranda warnings were in jeopardy. Encompassing *Doyle* as a lynch pin, Mr. Justice Stevens reasoned that regardless of how a reference to silence may be used, whether for impeachment or as evidence for sanity, the same protections must apply. Mr. Justice Stevens stated, "In both situations, the State then seeks to make use of the Defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach and the consequent penalty are identical in both situations." *Wainwright* 474 U.S. 293; 106 S. Ct. 634, 639 1986. Hence, any attempt to undermine the implied assurance that the exercise of one's right to remain silence would not be used against him is fundamentally unfair.

The decision made by the lower courts in this case clearly undermines the principles of *Doyle* and *Wainwright*. Under the facts of this case, Petitioner was arrested and given his Miranda rights. Upon the reading of the rights, Petitioner invoked his right to remain silent by stating "You've got me, what else can I say."

After invoking this right, the interview was terminated. During the trial, the State was allowed to introduce into evidence the statement made by Petitioner as to his acceptance of his right to remain silent. The prosecution then made reference to this statement, as well as the fact that Petitioner concluded the police interview, during his closing argument.

The Missouri Court of Appeals held that the *Doyle* principle was inapplicable. Although that court recognized the importance of *Doyle's* safeguards, it held that the statements made by Petitioner constituted a waiver of his right to remain silence. Thus, no such implied promise existed.

Such a conclusion cannot be deemed consistent with *Doyle v. Ohio* reasoning. The rationale in *Doyle* emphasized the importance of safeguarding the implied promise found in the Miranda rights and the protection of one who exercises that right. Petitioner was given that implied promise when the Miranda rights were read to him. His statement "You've got me, what else can I say" was his invocation of that right to remain silent. The fact that Petitioner invoked his right to remain silent upon conclusion of the Miranda warnings clearly shows that inducement was offered and accepted. Because of the importance attached to this inducement, this Honorable Court would not allow another court to find a waiver of said rights based upon a statement which invoked his rights. In *Doyle*, this Honorable Court did not find a waiver of one's right to remain silent, even though the Defendant responded to subsequent questioning with verbal statements. Clearly, Petitioner's statement cannot be deemed any more incriminating than the statements made by the Defendant in *Doyle*. The finding of a waiver of one's right to remain silent based on similar facts in this case clearly contradicts this Honorable Court's decision in *Doyle*.

This Honorable Court has clearly stated that it is impermissible for the prosecution to comment on a Defendant's right to remain silent when such silence is induced in view of the Miranda warnings. The rationale espoused by this Honorable Court in *Doyle v. Ohio*, clearly states that such references, even for impeachment purposes, are fundamentally unfair and violate Defendant's due process rights under the due process clause of the Fourteenth Amendment. This rationale, which safeguards implied assurances found in the Miranda warnings, was expanded by this Honorable Court to situations outside the sphere of impeachment by *Wainwright v. Greenfield*. Because the facts surrounding Petitioner's invocation of his Fifth Amendment Right to remain silent are so closely akin to the facts in *Doyle*, the decision of the Missouri Court of Appeals and Missouri Supreme Court affirming the trial court's allowance of the prosecution to comment upon Petitioner's silence flatly contradicts this Honorable Court's decisions in *Doyle* and *Wainwright*.

CONCLUSION

WHEREFORE, for the reasons, law, equity and other considerations presented, Petitioner prays that this Honorable Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A

MISSOURI COURT OF APPEALS,
EASTERN DISTRICT,
DIVISION THREE.

No. 59268

STATE of Missouri,
Plaintiff-Respondent,

v.

Leslie HARRIS,
Defendant-Appellant.

Jan. 14, 1992

Motion for Rehearing and/or Transfer to Supreme Court
Denied Feb. 19, 1992.

Application to Transfer Denied
March 24, 1992.

Defendant was convicted in the Circuit Court, City of St. Louis, Floyd McBride, J., of second-degree murder and armed criminal action, and he appealed. The Court of Appeals, Pudlowski, P.J., held that: (1) prosecutor's closing argument did not require mistrial; (2) indictment adequately set forth elements of the offense and apprised defendant of the offense; and (3) instruction on reasonable doubt was proper.

Affirmed.

1. Criminal Law [West Key Number System] 867, 1155

Declaration of mistrial is drastic remedy that should be employed in extraordinary circumstances in which prejudice to the defendant can be removed in no other way, and denial of mistrial is reviewed only to determine whether, as a matter of law, trial court abused its discretion.

2. Criminal Law [West Key Number System] 706(8)

Defendant was not entitled to mistrial when prosecutor ignored rulings of the court by asking questions concerning character of the deceased, forcing defendant to repeat objections, where there were relatively few instances of improper questioning, many of defendant's objections were sustained, and there was ample evidence against defendant.

3. Criminal Law [West Key Number System] 1130(2)

Claim which was raised in the argument section of defendant's brief but not in the point relied on was not preserved for appellate review. V.A.M.R. 84.04(d, e).

4. Criminal Law [West Key Number System] 1169.1(10)

Even if photograph of deceased was erroneously admitted, it had little probative value and not prejudice defendant.

5. Indictment and Information [West Key Number System] 60

Test of sufficiency of indictment is whether it contains all essential elements of the offense as set out in the statue and closely apprises defendant of facts constituting the offense.

6. Indictment and Information [West Key Number System] 128

Indictment charging murder adequately apprised defendant of the facts and set forth the essential elements by alleging that defendant "knowingly killed or caused death" of the victim, notwithstanding defendant's contention that the statute required that defendant "knowingly caused the death" and that "knowingly caused the death" and that "knowingly kills" requires less intent than "knowingly caused the death." V.A.M.S. § 565.020.

7. Criminal Law [West Key Number System] 720(6)

Prosecutor has the right to draw any inferences from the evidence that he believes can in good faith be justified.

8. Criminal Law [West Key Number System] 724(2)

In view of evidence against defendant, including eyewitnesses and defendant's own statements and actions, prosecutor's closing argument characterization of defendant as a "killer" was supported by the evidence.

9. Criminal Law [West Key Number System] 730(15)

Any error in prosecutor's reference in closing argument to defendant as a "lunatic in a truck" was cured when court sustained the objection and told jury to disregard the remark.

10. Criminal Law [West Key Number System] 1158(4)

In reviewing ruling on motion to suppress, court will view the facts and inferences therefrom in the light most favorable to the trial court's ruling, disregarding all contrary evidence and inferences, and trial court's ruling will be affirmed if the evidence is sufficient to sustain it.

11. Criminal Law [West Key Number System] 721(1)

State cannot comment on party's exercise of right to remain silent.

12. Criminal Law [West Key Number System] 412(3)

Defendant's statement to arresting officer "You got me, what else can I say?" was not an assertion of his right to remain silent and the statement was admissible.

13. Criminal Law [West Key Number System] 789(4)

Trial court properly gave instruction defining reasonable doubt as "firmly convinced of the defendant's guilt."

14. Criminal Law [West Key Number System] 730(3)

Homicide defendant was not entitled to mistrial when prosecutor attempted to ask defendant on cross-examination "Why sir, do you exhibit on your arm the picture of an executioner with an axe," where defendant did not answer the question and his objection was sustained.

15. Criminal Law [West Key Number System] 730(1)

Sufficiency of immediate corrective action informing jury to disregard improper argument is generally within the sound discretion of the trial court.

Shaw, Howlett & Knappenberger, Charles M. Shaw, Clayton for defendant-appellant.

William L. Webster, Atty. Gen., Millie Aulbur, Asst. Atty. Gen., Jefferson City, for plaintiff-respondent.

PUDLOWSKi, Presiding Judge.

This appeal arises out the judgments against the defendant for second degree murder, § 565.021, RSMo 1986; first degree assault, § 565.050, RSMo 1986; and armed criminal action, § 571.015, RSMo 1986. The judgments were obtained in the Circuit Court of St. Louis City and the defendant was sentenced to a total of 25 years imprisonment. On appeal the defendant alleges the trial court erred in: (1) failing to declare a mistrial because of repeated improper questions of the prosecutor; (2) failing to dismiss the defendant's indictment for murder when it was erroneously worded; (3) failing to declare a mistrial due to comment made by the prosecutor in his closing arguments; (4) failing to grant the defendant's motion for a new trial because the state failed to reveal a plea bargain with one of the witnesses; (5) overruling the defendant's motion to suppress a statement made by the defendant to the police; (6) submitting MAI-CR3d 302.04 defining reasonable doubt because it reduces the state's burden

of proof; and, (7) failing to declare a mistrial when the prosecutor asked the defendant on cross-examination about a tattoo on his arm. We affirm

The evidence presented at trial showed the following: On the night and early morning of July 3-4, 1989, Mark Nickels and Willie Jackson drove down to the St. Louis riverfront where the Veiled Prophet Fair was being held. Most of the festivities around the Gateway Arch were over so they decided to visit a popular area nearby, Laclede's Landing. While they were sitting in their vehicle at the intersection of Memorial and Washington Streets the defendant drove up in his truck and was beside the passenger side of Jackson's car. Jackson was driving the car and Nickels was seated in the passenger seat.

Jackson and Nickels glanced over at the defendant in his truck and the defendant responded by asking "What the hell are you looking at?" Jackson and Nickels told the defendant they weren't looking at anything and the defendant against asked "What the hell are you looking at, niggers?" At this point Jackson and the defendant began to argue rather vigorously. The defendant turned to his girlfriend seated next to him Jenny Waltman, and requested his gun which was in the glove box.

Waltman gave the defendant his gun and he leaned out the window and brandished the gun at Jackson and Nickels. When the two young men saw the gun they told the defendant they were sorry and that they didn't want any trouble. The defendant told Nickels "I want your friend that's driving the car." The defendant then shot Nickels in the head. After the shooting both vehicles sped away but Jackson stopped when he realized that Nickels was seriously wounded. The police arrived shortly thereafter and Nickels was taken away in an ambulance. It was later determined that he had died almost immediately from a gunshot wound to the head. The police investigation at the scene of the shooting and Jackson's car turned up no weapons but they did find a bullet lodged in the left door post.

After the shooting the defendant and Waltman sped away from the scene and went to Waltman's apartment. Either Waltman or the defendant wiped the fingerprints off the gun and placed it in a bag. They then left separately for a friend's apartment, Harry Hicks, and Waltman disposed of the gun in an apartment complex dumpster on the way. When the defendant arrived at Hicks' apartment he told his friend he had messed up and shot somebody.

When the defendant left Harry Hicks' apartment Harry called his brother Brett Hicks and told him the defendant's story. Brett then saw a story about the shooting in the July 5, 1989 *St. Louis Post-Dispatch* which contained a composite sketch of the man who was believed to have shot Nickels. Brett recognized the defendant from the sketch and contacted him. The defendant told Brett he was going to shave off his beard in an attempt to change his appearance from that of the sketch.

On July 14, 1989, the defendant contacted his friend, Tim Baker, and asked Baker if he would be willing to provide an alibi for him. After the police questioned the defendant, on July 21, he again contacted Baker and told him why he needed an alibi and what Baker and his girlfriend should tell the police in the event the police contacted the. Although Baker and his girlfriend agreed to provide the defendant an alibi they eventually told police they were not with him and that he had asked for an alibi. The defendant was arrested on August 7, 1989, and after the police read him his *Miranda* rights he responded that he understood them and then said, "You've got me, what else can I say."

At trial the defendant called several witnesses who testified to the amount of fighting that had taken place on the night of the shooting. The defendant also testified and claimed that he shot Nickels in self-defense. At the close of all the evidence the jury found the defendant guilty of second degree murder, first degree assault and armed criminal action. This appeal followed.

In his first point on appeal the defendant alleges that the trial court erred in overruling his repeated requests for a mistrial because of various objectionable questions asked by the prosecutor. The defendant argues the prosecutor repeatedly ignored the rulings of the court in his attempts to interject the character of the deceased. In addition, the defendant claims the prosecutor continually asked leading questions, misquoted witnesses during cross-examination and attempted improper impeachment. Finally, the defendant argues, all the errors mentioned above were compounded by the court's admitting into evidence a picture of the deceased, because this was another attempt to bring before the jury the good character of the victim.

[1] The declaration of a mistrial is a drastic remedy that should be employed only in extraordinary circumstances in which prejudice tot he defendant can be removed in no other way. *State v. Schneider*, 736 S.W.2d 392, 400 (Mo. banc 1987, *cert.denied*, 484 U.S. 1047, 108 S.Ct. 786, 98 L.Ed.2d 871 (1988). The trial court is in a better position than an appellate court to evaluate the prejudicial effect wince it has observed the incident giving rise to the request for a mistrial. *State v. Young*, 701 S.W.2d 429, 434 (Mo. banc 1985), *cert. denied*, 476 U.S. 1109, 106 S.Ct. 1959, 90 L.Ed.2d 367 (1986). Therefore, we review this only to determine whether as a matter of law the trial court abused its discretion in not declaring a mistrial. *Id.*

[2] Here, the defendant believes he was prejudiced because the prosecutor's improper question placed the defendant in a position where he had to either object to the questions or allow them in. If he objects the defendant argues he is prejudiced because this would "cast a pall over the jury and cause the jury to believe that the defendant is either attempting to hide something or act in a cruel and malicious manner." To avoid this appearance the defendant would have to allow in impermissible evidence before the jury.

In ruling against the defendant's motion for a new trial based upon the allegations above the court agreed with the defendant that the prosecutor ignored rulings of the court and forced the defendant to repeat the same objections. However, the court ruled that in the totality of the circumstances those isolated instances did not deprive the defendant of a fair trial. We agree.

The trial lasted nearly two weeks and the defendant has pointed to relatively few instances of improper questioning by the prosecutor. In many of these instances the defendant's objections were sustained and the jury was admonished to disregard the question. The prosecutor did on occasion ignore the rulings of the court and we in no way condone these actions by the prosecutor. However, the question remains whether the prosecutor's actions denied the defendant a fair trial the the trial court was in the best position to decide such a question. In addition, we must take into account the ample evidence against the defendant. This evidence includes eyewitnesses to the shooting, including the defendant's girlfriend, and the defendant's own statements and actions before his arrest. None of this evidence supports the defendant's claim of self-defense. Therefore, we agree with the trial court's decision that the relatively few improper questions asked by the prosecutor did not so prejudice the defendant as to deny him of a fair trial. "A conviction resulting from a fair trial should not be reversed for the purpose of disciplining and deterring prosecutors, particularly where the mechanism for discipline and deterrence is provided elsewhere." *State v. Smothers,* 605 S.W.2d 128, 132 (Mo. banc 1980).

[3, 4] Finally, the defendant argues that the errors mentioned above were compounded by the trial court allowing in a picture of the deceased. The defendant claims the photograph was irrelevant and immaterial and was an attempt by the prosecutor to interject the victim's character. This claim is raised in the argument section of his brief, but not in the point relied on. Thus,

it is not preserved for appellate review. Rule 84.04(d, e), *Washington v. State*, 772 S.W.2d 728, 729 (Mo.App. 1989). However, even if the photo was incorrectly admitted it had little if any probative value for the state and did not prejudice the defendant. Point denied.

In his second point the defendant claims the trial court erred in failing to dismiss his indictment for murder because the indictment was erroneously worded. The defendant was charged under § 565.020, RSMo 1986, which states "A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter." The indictment in the case at hand states in part as follows "the defendant, after deliberation, knowingly killed or caused the death of Mark Nickels." The defendant alleges the indictment is incorrect because it states "knowingly killed or caused the death" while the statute requires "knowingly caused the death." The defendant argues that "knowingly kills" requires less intent than "knowingly caused the death" and therefore the indictment is erroneous. In addition, the defendant argues the indictment is erroneous in that it reads "after deliberation" but does not contain the words "upon the matter" which are contained in the statute.

[5, 6] The test of sufficiency of an indictment is whether it contains all essential elements of the offense as set out in the statute and closely apprises the defendant of the facts constituting the offense. *Puckett v. State*, 782 S.W.2d 454, 455 (Mo.App. 1990). *See* Supreme Court Rule 23.01(b). Rule 23.01(e) states, "all indictments or informations which are substantially consistent with the terms of indictments or informations which have been approved by the Missouri Supreme Court shall be deemed to comply with the requirements of this Rule 23.01(b)." MACH-CR 13.02 states in pertinent part the following: "this defendant, after deliberation knowingly (killed) (caused the death of)...." The defendant's indictment contains the exact language as provided in MACH-CR 13.02. In addition, the indictment

contains all the essential elements of the offense of first degree murder and clearly apprised the defendant of the facts constituting this murder. Therefore the defendant's second point is denied.

[7, 8] The defendant's next point alleges the trial court erred when it refused to declare a mistrial during the prosecutor's closing argument because of certain comments made by the prosecutor. During his argument the prosecutor refereed to the defendant as a "lunatic in a truck" and a "killer."

The declaration of a mistrial is a drastic remedy that should only be employed in extraordinary circumstances in which prejudice to the defendant can be removed in no other way. *State v. Schneider,* 736 S.W.2d 392, 400 (Mo. banc 1987), *cert. denied,* 484 U.S. 1047, 108 S.Ct. 786, 98 L.Ed.2d 871 (1988). The trial court is in a better position than an appellate court to evaluate the prejudicial effect of the incident, therefore, the decision of the trial court should not be overturned unless there is an abuse of discretion. *State v. Young,* 701 S.W.2d 429, 434 (Mo. banc 1985) *cert. denied,* 476 U.S. 1109, 106 S.Ct. 1959, 90 L.Ed.2d 367 (1986).

The prosecutor has a right to draw any inference from the evidence that he believes in good faith to be justified. *State v. Bostic,* 789 S.W.2d 804, 808 (Mo.App. 1990). In *Bostic* the defendant claimed the court erred in allowing the prosecutor to refer to him as a "robber" during closing arguments. The court ruled against the defendant and noted the prosecution could reasonably have drawn an inference from the evidence that the defendant was a robber. *Bostic,* 789 S.W.2d at 809. Here, the evidence against the defendant included eyewitnesses and the defendant's own statements and actions. This evidence was more than sufficient to support the characterization of the defendant as a killer.

[9] The prosecutor also referred to the defendant as "a lunatic in a truck." It could also be argued that there was sufficient evidence to support such a characterization of the defendant but the court sustained the objection and told the jury to disregard the remark. Thus, if the prosecutor's remark was improper it was cured by the trial court's instruction to the jury. *State v. Allison*, 745 S.W.2d 178, 181 (Mo.App. 1987). Further, this remark was not repeated and taking into account the evidence against the defendant as compared to this one remark the defendant was not prejudiced. Point denied.

On his fourth point the defendant claims the trial court erred in failing to grant the defendant's motion for a new trial because the state failed to reveal to the defendant a plea agreement between the state and one of its witnesses. The defendant alleges that Jenny Waltman, who was charged with hindering prosecution, was told by authorities of the state that she would be placed on probation and her child could remain with her if she would give evidence for the state that would incriminate the defendant. The defendant argues that the state must reveal such agreements that it makes with a witness and the state failed to do so here.

Supreme Court Rules 25.03 and 25.08 do require the state to reveal any plea agreement it makes with a witness in exchange for testimony at trial. However, the defendant has cited no facts at all to support his assertion above that there was a plea agreement between Ms. Waltman and the state. Instead, the evidence points to the contrary.

Both Waltman and the state contend there was no plea agreement between the parties. The facts show that at Waltman's guilty plea hearing on December 14, 1989, the state recommended that she receive three years imprisonment for hindering prosecution. The maximum penalty for such an offense is five yeas with no minimum term required. Waltman's sentencing took place on September 14, 1990, while the trial of defendant

was still in progress and after Waltman had testified at his trial. At the sentencing the prosecuting attorney handling Waltman's case told the court that Waltman had been cooperative with the state although not as cooperative as her attorney indicated to the court. Nevertheless the state held to its request of three years imprisonment for Waltman and, at her attorney's recommendation, she was granted probation and given a suspended imposition of sentence. The defendant has cited no facts to support his contention that there was a plea agreement between the parties and the record does not indicate any such agreement. Point denied.

On his next point the defendant alleges the trial court erred in not suppressing a statement made by the defendant after he was arrested. The defendant contends his statement, "You got me, what else can I say?," was merely an assertion of his Fifth Amendment right to remain silent and that the state cannot comment on a party exercising this right.

[10] In reviewing the trial court's ruling on a motion to suppress evidence, we will view the facts and inferences therefrom in the light most favorable to the trial court's ruling, disregarding all contrary evidence and inferences. *State v. Bittick,* 806 S.W.2d 652, 654 (Mo. banc 1991). If the evidence is sufficient to sustain the trial court's findings well will affirm. *Id.*

[11, 12] The defendant is correct that the state cannot comment on a party exercising their right to remain silent. *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); *State v. Crow,* 728 S.W.2d 229, 230 (Mo.App. 1987). However, here the defendant's statement was not an assertion of his right to remain silent, but rather a statement after he indicated he understood his rights. The defendant was arrested on August 7, 1989 and taken to the homicide division. He was read his *Miranda* rights and advised of the charges against him. The defendant

indicted he understood his rights and when asked about the murder responded "You go me, what else can I say?". When questioned further the defendant said he would like to speak to his attorney before making any further statements. Thus, the defendant's statement was not an assertion of his rights and was made before he invoked these rights. Therefore, the trial court did not err in submitting this statement and defendant's point is denied.

[13] The defendant's sixth point on appeal contends the trial court erred in submitting MAI-CR3d 302.04 as instruction No. 4 because it improperly defines reasonable doubt. The defendant argues the instruction reduces the states burden of proof and therefore violated the defendant's right to due process and a fair trial. The defendant cites the recent Supreme Court decision in *Cage v. Louisiana*, __ U.S. __, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) in support of his contention.

Instruction No. 4 defines reasonable doubt as "firmly convinced of the defendant's guilt" and contains the exact language found in MAI-CR3d 302.04. In *State v. Antwine*, 743 S.W.2d 51, 62-63 (Mo. banc 1987), *cert. denied*, 486 U.S. 1017, 108 S.Ct. 1755, 100 L.Ed.2d 217 (1988) the Missouri Supreme Court found that " 'firmly convinced' is essentially synonymous with 'beyond a reasonable doubt.' " In a more recent case the Supreme court decided that MAI-CR3d 302.04 "clearly requires that the jury find the defendant guilty beyond a reasonable doubt and merely explains that term to the jury, unlike the charge in *Cage*, which equated proof beyond a reasonable doubt with a lower standard." *State v. Griffin*, 818 S.W.2d 278, 282 (Mo. banc 1991). Thus, the court reaffirmed its holding in *Antwine* and found this instruction meets the constitutional requirement that the jury must be instructed that the defendant be proven guilty beyond a reasonable doubt. *Id.* Point denied.

The defendant alleges on his final point that the trial court erred in not declaring a mistrial because of a question asked by the prosecutor during his cross-examination of the defendant.

As we have stated twice earlier in this opinion, the declaration of a mistrial is a drastic remedy that should be employed only in extraordinary circumstances in which prejudice to the defendant can be removed in no other way. *State v. Schneider,* 736 S.W.2d 392, 400 (Mo. banc 1987), *cert. denied,* 484 U.S. 1047, 108 S.Ct. 786, 98 L.Ed.2d 871 (1988). The trial court is in a better position than we are to evaluate the prejudicial effect since it has observed the incident giving rise to the request for a mistrial. *State v. Young,* 701 S.W.2d 429, 434 (Mo. banc 1985), *cert. denied,* 476 U.S. 1109, 106 S.Ct. 1959, 90 L.Ed.2d 367 (1986). Therefore, we review this only to determine whether as a matter of law the trial court abused its discretion in not declaring a mistrial. *Id.*

[14, 15] Here, the prosecutor attempted to ask the defendant on cross-examination "Why, sir, do you exhibit on your arm the picture of an executioner with an axe. . . ." The defendant did not answer the question and his objection was sustained. In addition, the trial court admonished the jury to disregard the prosecutor's question. Generally, the sufficiency of such immediate corrective action is with the sound discretion of the trial court. *State v. Alexander,* 729 S.W.2d 467, 469 (Mo. banc 1986). Given the facts that the prosecutor did not finish his question, the defendant did not answer the question, and the court took immediate corrective actions we find the trial court did not abuse its discretion in denying the defendant's request for a mistrial. Point denied.

Judgment affirmed.

STEPHAN and CHRIST, J.J., concur.

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF MISSOURI

No. ____
Missouri Court of Appeals
Eastern District No. 59268

STATE OF MISSOURI,
Respondent,

v.

LESLIE HARRIS,
Appellant.

APPLICATION FOR TRANSFER TO THE MISSOURI SUPREME COURT AND SUGGESTIONS IN SUPPORT THEREOF

Comes now appellant, Leslie Harris, by and through his attorneys of record, Shaw, Howlett & Knappenberger, and moves this Honorable Court to grant transfer of this case to the Missouri Supreme Court, pursuant to Rules 30.27 and 83 and as grounds therefore states as follows:

1. The Eastern District Court of Appeals, as shown by its Opinion of January 14, 1992, has overlooked and/or misinterpreted material matter of law and fact in the following respects, to-wit:

(a) The Appellate Court did not properly consider the prejudicial effect of the prosecutor's improper questions and comments in their totality. The Appellate Court addressed three separate instances of improper conduct by the prosecution individually and independently of each other and concluded that the prejudicial effect to the Defendant was not such as to require a remedy such as a declaration of a mistrial. However, the

Appellate Court failed to consider the prejudicial effect of the prosecutor's improper conduct in its totality thereby meriting the drastic remedy of the declaration of a mistrial.

In the instant case, the prosecutor continually ignored rules of the court in his persistent attempts to interject the character of the deceased. Additionally, the assistant circuit attorney's comments, in closing arguments were improper, characterizing the Defendant as a "Lunatic in a truck" and a "Killer." Finally, the asst. circuit attorney asked improper questions regarding a tattoo on the Defendant's arm.

The Appellant concedes that the declaration of a mistrial is a drastic remedy and should only be employed in extraordinary circumstances in which prejudice to the Defendant can be relieved in no other way, *State v. Schneider,* 736 SW 2d 392, 400 Mo. Banc (1987) cert. denied, 484 U.S. 1047, 108 S.Ct. 786 (1988). However, all of the above referenced errors should be taken as a whole to determine their prejudicial effect. Each of the improper incidents, in and of themselves, may not cause the amount of prejudice necessary to justify a mistrial. However, when taken together, they clearly constitute prejudice that can only be cured by a mistrial.

(b) The appellate Court failed to properly consider whether the indictment was properly worded. The indictment fails to apprise the Defendant of the facts constituting the offense for which he is charged.

The indictment reads that the Defendant "knowingly killed or caused the death." The statutes require "knowingly caused the death" 565.020 RSMo 1986. Furthermore, the indictment does not contain the words "upon the matter." The Appellate court determined that all of the essential elements of the offense were set out in the indictment and, therefore, the Defendant was properly apprised of the facts constituting the offense.

However, the Appellate Court considered whether the words "knowingly killed" required less intent than "knowingly caused the death after deliberation upon the matter." In order to be proper the indictment must contain all essential elements of the offense as set out in statute, Supreme Court Rule 23.01, *State v. Evans*, App. 1982 637, SW 2d 62.

Additionally, deliberation is an element which distinguishes capital murder from second degree murder. Therefore, it is an essential element of capital murder. Therefore, it is an essential element of capital murder, *State v. Gilmore*, 1983 650 SW 2d 627, cert. denied. By failing to include the words "caused the death" and "upon the matter" the indictment requires less actual deliberation and, therefore, does not state the elements of the offense. "Knowingly killed" requires only that the Defendant has knowledge that he has performed an act. It does not require that the Defendant consider what he is about to do. Therefore, the information is erroneous and the court never acquired jurisdiction in this case.

(c) The Appellate Court did not properly interpret the law regarding Harris' statement, "You've go me, what else can I say." Additionally, the Appellate Court did not properly consider the facts regarding the statement. The Appellate court approached the issue by referring to the statement as "incriminatory." The court then goes on to decide that the statement is relevant and probative.

However, Appellant's argument is that the statement is not incriminating, and is an attempt to invoke his Fifth Amendment right to remain silent. It is established law that it is impermissible for the State to comment on the Defendant's exercise of that right. *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); *State v. Crow*, 728 S.W. 2d 229, (Mo. App. 1987). In the United States Supreme case of *Doyle v. Ohio*, supra, the statements made by the Defendant were, "What's this all about?", at

2243 and, "You've got to be crazy," and "I don't know what you are talking about," at 2243. In that decision, the court found that those statements were insufficient to allow the State to comment on the Defendant's asserting his right to remain silent. In *State v. Crow,* supra, the Defendant stated, in response to booking questions by a highway patrolman, "He was on his way to Jefferson City . . . [and] it would be for nothing." The court in *Crow* determined that such a statement was an "indefinite expression referring, if to anything, to his possible conviction, not to the specifics of the alleged criminal act." Id. at 231. The court then determined that such a statement is not a waiver of Defendant's right to remain silent. Id. at 231. The court went on to determine that in order to waive his right to silence, the Defendant must make a statement *obviously* related to something, and that the statement was too vague to be a waiver. Id. at 232. (Emphasis added.)

The Defendant's statement, "You've got me, what else can I say?" was analogous to the statement in *Doyle* and *Crow* and was clearly too ambiguous to be considered a waiver of Appellant's constitutional right to remain silent. Therefore, references by the assistant circuit attorney to such a statement was clearly in violation of the Defendant's rights to remain silent pursuant to the United States Constitution and the Missouri Constitution.

In addition, the statement made by the Appellant were made during a custodial interrogation. The police, in this case, had reasonable grounds to believe that a crime had been committed and that the Defendant had committed it. *State v. Deloch,* 628 S.W.2d 954, 956 (Mo.App. 1982). Furthermore, at the time of the interrogation, the investigation was focused directly on the Defendant. *State v. Bradley,* 670 S.W.2d 123, 126 (Mo.App. 1984). Since this statement was made during a custodial interrogation, it is forbidden by *Miranda. Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d, 694 (1966); *State v. Coty,* 801 S.W.2d 430 (Mo.App. 1990).

As the decision of the Court of Appeals in this regard is contrary to opinions of Appellate Courts in Missouri and in the United States, this issue clearly merits re-examination.

(d) Although the Supreme Court of Missouri has specifically approved the language regarding the definition of reasonable doubt in MAI-CR3rd 302.04, this court should re-examine this issue in light of the recent United States Supreme Court decision in *State of Louisiana v. Tommy Cage*. This points out, once again, the dangers and risks inherent in attempting to define "reasonable doubt" as Missouri's instructions have.

2. The above matters are questions of general interest or importance in the State of Missouri and the existing law thereon merits re-examination. The decisions of the Court of Appeals in this regard are also contrary to previous opinions of Appellate Courts of Missouri.

WHEREFORE, Appellant respectfully requests this Honorable Court to grant transfer to the Missouri Supreme Court for further proceedings.

Shaw, Howlett & Knappenberger

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Copy hereof mailed this 26 day of February, 1992 to Office of the Attorney General, State of Missouri, Post Office Box 899, Jefferson City, Missouri 65102 and Clerk, Missouri Court of Appeals, Eastern District, Wainwright State Office Building, 111 N. 7th Street, St. Louis, Missouri 63101.

/s/ James J. Knappenberger

APPENDIX C

IN THE SUPREME COURT OF MISSOURI

No. 74631
E.D. No. 59268

January Session, 1992

State of Missouri,
Plaintiff-Respondent,
vs. (TRANSFER)
Leslie Harris,
Defendant-Appellant.

Now at this day, on consideration of defendant-appellant's application to transfer the above-entitled cause from the Eastern District Court of Appeals, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1992,and on the 24th day of March, 1992, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 24th day of March, 1991.

/s/ Thomas F. Simon, Clerk

_____D.C.

PROOF OF SERVICE

The undersigned certifies that three copies of the foregoing were mailed this 16th day of June, 1992, by first class mail, postage prepaid, to: Office of the Attorney General, Post Office Box 899, Jefferson City, Missouri 65102.

James J. Knappenberger